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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BANCO NACIONAL DE CUBA, PETITIONER

v.

PETER L. F. SABBATINO, AS RECEIVER AND F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE AND HELEN G. DOWNS, CO-PARTNERS DOING BUSINESS AS FARR, WHITLOCK & CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF *AMICUS CURIAE*

AND

SUPPLEMENTAL BRIEF FOR THE COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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The Committee on International Law of the Association of the Bar of the City of New York hereby respectfully moves for leave to file a supplemental brief *amicus curiae* in this case.

In the course of oral argument the question was raised whether jurisdiction of the federal courts in this case is based solely upon the diversity of citizenship of the parties

and, if so, whether the law of New York must be applied by the federal courts. The question was also raised whether New York has an "act of state doctrine" under which the Cuban nationalization decree would be given effect by New York Courts. Since the Committee on International Law is composed of members of the New York Bar versed in New York law, the Committee wishes to file a supplemental brief amplifying its views on the questions of New York law involved.

It is believed that this supplemental brief, attached hereto, develops more fully than any of the materials previously filed the questions whether New York law applies and whether New York has an "act of state doctrine". If the arguments contained in this supplemental brief are accepted, they would be dispositive of this case.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

QUESTIONS PRESENTED

This brief will discuss the following questions:

(1) whether the jurisdiction of the federal courts in this case is based solely upon the diversity of citizenship of the parties, and whether the federal courts should apply New York law; and

(2) whether the Cuban decree in this case would be given effect under New York law.

SUMMARY OF ARGUMENT

I.

In a case in which federal jurisdiction is based solely upon the diversity of citizenship of the parties, federal courts must apply State law, including State conflict of laws rules, as rules for their decision. *Erie Railroad Co.* v. *Thompkins*, 304 U. S. 64 (1938), *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941). In *Griffin* v. *McCoach*, 313 U. S. 498 (1941), it was held that a State rule of "public policy" must be applied by federal courts sitting in diversity cases to bar enforcement of a right created outside of the forum State.

The fact that a case raises questions which will have some impact upon relations between the United States or other countries is not alone sufficient to give rise to a federal question or to warrant the application of a federal substantive law in diversity cases. On the other hand, if a decision according to State law would engage the responsibility of the United States under international law, such a case would present a federal question and warrant the application of federal case law.

If application of State law would result in a violation of customary international law, a federal court might be justified in treating the case as presenting a federal question and in applying federal law. However, the "act of state doctrine" is not a recognized rule of international law and the failure to apply that doctrine would not engage the responsibility of the United States under international law.

II.

It is clear that New York has no rule of judicial abstention or "act of state doctrine" which would preclude courts of that State from reviewing foreign takings of

property. New York courts have consistently refused to give effect to foreign takings which violate New York public policy. See e.g. *Vladikavkazsky Ry. Co.* v. *New York Trust Co.*, 263 N. Y. 369, 189 N. E. 456 (1934).

New York public policy requires, as a minimum standard, that takings of property by foreign states accord with international law. See *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 167 N. E. 430 (1929); *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 146 N. E. 369 (1925); *Sulyok* v. *Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 111 N. Y. S. 2d 75 (Sup. Ct. 1952).

Although an application of the minimum standard of New York public policy, the test of international law, would clearly bar enforcement of the Cuban decree in that State, most New York cases have found uncompensated takings of property by foreign sovereigns to violate public policy whether or not they violate international law.

ARGUMENT

I.

Jurisdiction of the Federal Courts in this Case is Based Upon the Diversity of Citizenship of the Parties, and the Federal Courts Should Apply New York Law.

As argued at pages 8-15 of the Committee's brief, the issues involved in this case do not arise "under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. Indeed, the respective counsel for petitioner and for the United States as *amicus curiae* conceded upon oral argument, on October 22, 1963, that the so-called "act of state doctrine" is a judge-created rule of substantive or "positive" law which does not derive from the Constitution or any statute or treaty of the United States.

In a case in which federal jurisdiction is based solely upon the diversity of citizenship of the parties, federal courts must apply State law, including State conflict of laws rules, as rules for their decision. 28 U. S. C. § 1652; *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487 (1941). At the time this Court decided the *Ricaud* case,* *Swift* v. *Tyson,* 41 U. S. (16 Pet.) 1 (1842), was the law, and the federal courts were free to fashion their own "rules of decision" in all diversity cases in which no State statutory or constitutional provisions were applicable. Thus, in the *Ricaud* case, federal jurisdiction being based upon diversity of citizenship, this Court was free to expound a federal "rule for their decision", 246 U. S. at 309, which has come to be known as the "act of state doctrine".

However, since the decision of this Court in *Erie,* no such federal rule of decision may be applied by the federal courts sitting in diversity cases, because Section 34 of the Judiciary Act of 1789, which appears substantially unchanged as 28 U. S. C. § 1652, is now interpreted to require that State case law, as well as State constitutional and statute law, must be regarded as "rules of decision" in federal courts unless the "Constitution, treaties, or statutes of the United States otherwise require or provide". In *Griffin* v. *McCoach,* 313 U. S. 498 (1941) it was held that a state rule of "public policy" must be applied by federal courts sitting in diversity cases to bar enforcement of a right created outside of the forum state. To the same effect see *Hughes* v. *Lucker,* 174 F. 2d 285 (3d Cir. 1949) and *O'Connor* v. *Johnson,* 74 F. Supp. 370 (W. D. N. Y. 1947). See, especially, *State of the Netherlands* v. *Federal Reserve Bank,* 99 F. Supp. 655, 666-7 (S. D. N. Y. 1951), in which a federal court applied New York law, including the public

Ricaud v. *American Metal Co.,* 246 U. S. 304 (1918).

policy of New York, to refuse effect to a taking by the German government of occupation in the Netherlands of property located there.

The fact that a case raises questions which will have some impact upon relations between the United States and other countries is not alone sufficient to give rise to a federal question or to warrant the application of a federal substantive law in diversity cases. On the other hand, if a decision according to State law would engage the responsibility of the United States under international law, such a case would raise a federal question and warrant the application of federal case law. And, it is clear that State law must give way to United States treaties, see *Kolovrat* v. *Oregon*, 366 U. S. 187 (1961), and to executive agreements, see *United States* v. *Belmont*, 301 U. S. 324 (1937); *United States* v. *Pink*, 315 U. S. 203 (1942); *Bernstein* v. *Van Heyghen Freres, S. A.*, 163 F. 2d 246 (2d Cir.), *cert. denied*, 332 U. S. 772 (1947), as ultimately interpreted by this Court. *But see Clark* v. *Allen*, 331 U. S. 503 (1947) in which State law regarding the inheritance of personalty was held applicable to questions outside the area of specific application of relevant treaty provisions between the United States and Germany.

If application of State law would result in a violation of customary international law—that is, international law to which the United States has not agreed to be bound by treaty or Executive agreement—a federal court might be justified in treating the case as presenting a federal question and in applying federal law. However, it is not seriously argued, as it may not be, that the "act of state doctrine" is a recognized rule of Law (see Appendix I to the Committee's brief) and that failure to apply that doctrine would engage the responsibility of the United States under international

law. In a case involving a claim of diplomatic immunity in which the jurisdiction of the federal court was based solely upon diversity of citizenship, *Bergman* v. *De Sieyes*, 170 F. 2d 360, 361 (2d Cir. 1948), the court, in an opinion by Judge Learned Hand, applied New York law, stating as follows:

> "... since the defendant was served while the cause was in the state court, the law of New York determines its validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves. Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here."

II.

The Cuban Decree in this Case is Contrary to the Public Policy of New York and Would Not Be Given Effect Under New York Law.

It is clear that New York has no rule of judicial abstention or "act of state doctrine" which would preclude courts of that State from reviewing foreign takings of property. Indeed, New York courts have consistently refused to give effect to foreign takings which violate New York public policy. The rule in New York is stated in *Vladikavkassky Ry. Co.* v. *New York Trust Co.*, 263 N. Y. 369, 378, 189 N. E. 456, 460 (1934), as follows:

> "The principle which determines whether we shall give effect to foreign legislation is that of public

> policy. . . . Where there is a conflict between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail."

New York public policy requires as a minimum standard, that takings of property by foreign states accord with international law. Uncompensated takings of the property of aliens, a violation of the law of nations (see pages 32-43 of the Committee's Brief), have consistently been denied effect in New York. In *Frankel & Co.* v. *L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 249, 167 N. E. 430, 432 (1929), the Court of Appeals refused to give effect to a French statute declaring "null and void" all agreements between citizens of France and Germany. The plaintiff was an American citizen who had acquired by assignment rights under a contract made in France between a Frenchman and a German, and the defendant defended on the grounds of the French statute. The Court held, as an alternative ground:

> "If, however, the decree were to be read as intended to include the contract in suit and its assignment to the plaintiffs, we think there is no principle of private or public international law that imposes upon our courts a duty to enforce it. We would depart from our settled rule if we were to hold that either comity or public law requires us to give effect to a confiscatory mandate against our own citizen."

To the same effect is *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257, 146 N. E. 369, 371 (1925), in which effect was refused a Soviet decree purporting to terminate the liability of a Russian corporation to an English company and its American assignee, the plaintiff in the case. The Court said:

> "Neither comity nor public policy requires us to enforce a mandate of confiscation at the behest of such

> a government to the prejudice either of our own citizens or those of any friendly power seeking justice in our courts."

Similarly, in *Sulyok* v. *Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 535, 111 N. Y. S. 2d 75, 82, (Sup. Ct. 1952), the court was faced with a Hungarian decree confiscating plaintiff's pension rights under a contract with defendant, a Hungarian corporation, made and to be performed in Hungary. Defendant pleaded the Hungarian decree in defense, but the court refused to give effect to the decree, stating:

> ". . . our public policy does not require us to enforce foreign decrees of confiscation, even by recognized countries, against persons who were not citizens of those States at the time when the edicts of confiscation were issued."

And, in *Schwartz* v. *Compania Azucarera Vertientes-Camaguey de Cuba*, 28 Misc. 2d 355, 356, 208 N. Y. S. 2d 833, 835 (Sup. Ct. 1960) involving the decree in question in the present case the Court said "our courts have held that nationalization decrees of foreign governments are repugnant to the public policy of the State of New York."

In *Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 227, 186 N. E. 679, 682 (1933), the court gave effect to a taking of property because the property was taken from a national of the taking state and no violation of international law was found. As the court noted:

> "According to the law of nations, it [Russia] did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia. . . ."

Likewise, in *Werfel* v. *Zivnostenska Banka*, 260 App. Div. 747, 752, 23 N. Y. S. 2d 1001, 1005 (1940) effect was

given to a Czech decree which was held not to be confiscatory. In so holding, the court applied the standard of international law when it said:

> "It is impossible to treat such decrees as violating the law of nations and as not subject to respect by the courts of the United States."

Although an application of the minimum standard of New York public policy, the test of international law, would clearly bar enforcement of the Cuban decree in that State, most New York cases have found uncompensated takings of property by foreign sovereigns to violate public policy whether or not they violate international law.

In numerous cases foreign confiscatory decrees purporting to affect property located in New York have been denied enforcement on the grounds that they violate public policy. While these cases are not directly in point, they do represent analogous expressions of New York public policy. In *Vladikavkazsky Ry. Co.* v. *New York Trust Co.*, *supra*, the Court of Appeals, holding that a Soviet confiscatory decree did not bar recovery by a former Russian corporation of funds on deposit in a New York bank, said:

> "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets, and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords us no controlling reason why it should be enforced in our courts." 263 N. Y. at 378-79, 189 N. E. at 460

Accord: *Gonzales* v. *Industrial Bank (of Cuba)*, 12 N. Y. 2d 33, 186 N. E. 2d 410 (1962) (holding that no attempted confiscatory act of the Cuban government could affect funds in New York belonging to a Cuban corporation);

A/S Merilaid & Co. v. *Chase Nat'l Bank*, 189 Misc. 285, 71 N. Y. S. 2d 377 (Sup. Ct. 1947) (holding Estonian confiscatory decree did not bar Estonian corporation from recovering funds deposited in New York bank); *Bollack* v. *Societe Generale*, 263 App. Div. 601, 33 N. Y. S. 2d 986 (1942) (holding French confiscatory decree did not deprive Frenchman of title to securities located in New York); *Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149, 147 N. E. 703 (1925) ("We give or deny the effect of law to decrees or acts of a foreign governmental establishment in accordance with our own public policy"—dictum); *cf. Mann* v. *Compania Petrolera Trans-Cuba S. A.*, 32 Misc. 2d 790, 223 N. Y. S. 2d 900 (Sup. Ct. 1961) (affirming referee's report that effort of intervenor appointed by Cuban government to control a litigation affecting New York assets of a Cuban corporation was "shocking to our sense of justice and equity"); *Plesch* v. *Banque Nationale de la Republique d'Haiti*, 273 App. Div. 224, 77 N. Y. S. 2d 43, *aff'd per curiam*, 298 N. Y. 573, 81 N. E. 2d 106 (1948) (holding confiscatory decrees of Haitian government appeared on their face sufficiently contrary to public policy to support warrant of attachment of securities located in New York); *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286, 20 N. E. 2d 758 (1939), *aff'd by equally divided court*, 309 U. S. 624 (1940) (holding Soviet confiscatory decree did not affect assets of former Russian corporation held by New York bank).*

*There is a line of cases involving takings from nationals of the taking state relating to contracts entered into and to be performed in the taking state in which the taking has been given effect on the ground that "it cannot be against the public policy of this state to hold nationals to the contracts which they have made in their country to be performed there according to the laws of that country." *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N. Y. 71, 193 N. E. 897 (1934). *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474, 14 N. E. 2d 798 (1938); *Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft*, 182 Misc. 776, 45 N. Y. S. 2d 882 (1943).

The public policy of New York is also reflected in Section 977-b of the New York Civil Practice Act, paragraph 19 of which provides, *inter alia*:

> "[A]ny confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible debts, demands or choses in action of such [nationalized] corporation within the state. . . ."

See *Augstein* v. *Banska A Hutni Akciova Spolecnost*, 124 N. Y. S. 2d 446 (Sup. Ct.), *modified on other grounds*, 282 App. Div. 929, 125 N. Y. S. 2d 647 (1953); *Rothschild* v. *Naamlooze Vennootschap Gebroeders Pappenhenheim's Tabakshandel*, 194 Misc. 889, 88 N. Y. S. 2d 157 (Sup. Ct. 1949); *Oliner* v. *American-Oriental Banking Corp.*, 252 App. Div. 212, 297 N. Y. S. 432, *aff'd mem.* 277 N. Y. 588, 13 N. E. 2d 783 (1938).

Thus, measured against the benchmark of New York public policy, the Cuban decree in this case would not be given effect under New York law.

CONCLUSION

For the reasons stated it is respectfully submitted that the Judgment should be affirmed.

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